

Thursday, December 19, 2024 at 16:29:16 Eastern Standard Time

Subject: RE: Baird v Nessel et al

Date: Thursday, December 12, 2024 at 2:48:01 PM Eastern Standard Time

From: Barranco, Kyla (AG)

To: Michael Rizik, Smith, Joshua (AG), Southerland, Kristin (AG), Thomas, Lynne (AG), Albro, Lisa (AG), Ballinger, Bobbi (AG), Barton, Brenda (AG), Richards, Margaret (AG), Donnelly, Mark (AG-Contractor)

CC: Michael Edmunds, Nancy Temple, Autumn Trantham

Good afternoon all –

On behalf of the Attorney General, Mark and I agree with Josh that a Rule 26(f) conference would be premature at this point. Given the immunity defenses in this case, which operate as complete defenses to suit (not just liability), it would be a waste of everyone's time at this point to have a Rule 26(f) conference. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until [the] threshold immunity question is resolved, discovery should not be allowed."); *Howe v. City of Enter.*, 861 F.3d 1300, 1302 (11th Cir. 2017) (per curiam) ("[R]equiring the parties to develop their Rule 26(f) report before the court ruled on the immunity defenses is [] inconsistent with . . . decisions which establish that immunity is a right not to be subjected to litigation beyond the point at which immunity is asserted."); *Grabowski v. QBE Ams., Inc.*, 2016 WL 7116594 (E.D. Mich. Dec. 7, 2016) (distinguishing immunity from other "garden-variety" 12(b)(6) motions).

Thank you,

Kyla

Kyla Barranco

Assistant Solicitor General

Michigan Department of Attorney General

(517) 335-7628 (main line)

(517) 281-2938 (state cell)

Plaintiff's Exhibit

From: Michael Rizik <lawyers@riziklaw.com>

Sent: Thursday, December 12, 2024 1:53 PM

To: Smith, Joshua (AG) <SmithJ191@michigan.gov>; Southerland, KrisRn (AG)

<SoutherlandK@michigan.gov>; Thomas, Lynne (AG) <ThomasL21@michigan.gov>; Barranco, Kyla (AG)

<BarrancoK@michigan.gov>; Albro, Lisa (AG) <AlbroL@michigan.gov>; Ballinger, Bobbi (AG)

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<RichardsM1@michigan.gov>; Donnelly, Mark (AG-Contractor) <donnellym@michigan.gov>

Cc: Michael Edmunds <medmunds@gaultdavison.com>; Nancy Temple <ntemple@kaZentemple.com>;

Autumn Trantham <autumn@riziklaw.com>

Subject: Re: Baird v Nessel et al

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Yes.

Would you please clarify to whom you're speaking? If not for all defendants any longer, please ask Ms. Baranco or Mr. Donnelly to let me know their position on the conference.

Michael B. Rizik Jr.
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From: "Smith, Joshua (AG)" <SmithJ191@michigan.gov>
Date: Thursday, December 12, 2024 at 1:48 PM
To: Michael Rizik <lawyers@riziklaw.com>, "Southerland, KrisRn (AG)" <SoutherlandK@michigan.gov>, "Thomas, Lynne (AG)" <ThomasL21@michigan.gov>, "Barranco, Kyla (AG)" <BarrancoK@michigan.gov>, "Albro, Lisa (AG)" <AlbroL@michigan.gov>, "Ballinger, Bobbi (AG)" <BallingerB1@michigan.gov>, "Barton, Brenda (AG)" <bartonb2@michigan.gov>, "Richards, Margaret (AG)" <RichardsM1@michigan.gov>, "Donnelly, Mark (AG-Contractor)" <donnellym@michigan.gov>
Cc: Michael Edmunds <medmunds@gaultdavison.com>, Nancy Temple <ntemple@kaZentemple.com>, Autumn Trantham <autumn@riziklaw.com>
Subject: RE: Baird v Nessel et al

Do I have your consent to sign for you on the stipulation to extend?

Joshua Sean Smith
Assistant Attorney General
Corrections Division
P.O. Box 30217
Lansing, MI 48909
Phone: 517-335-3055
Fax: 517-335-7157

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From: Michael Rizik <lawyers@riziklaw.com>

Sent: Thursday, December 12, 2024 1:47 PM

To: Smith, Joshua (AG) <SmithJ191@michigan.gov>; Southerland, KrisRn (AG) <SoutherlandK@michigan.gov>; Thomas, Lynne (AG) <ThomasL21@michigan.gov>; Barranco, Kyla (AG) <BarrancoK@michigan.gov>; Albro, Lisa (AG) <AlbroL@michigan.gov>; Ballinger, Bobbi (AG) <BallingerB1@michigan.gov>; Barton, Brenda (AG) <bartonb2@michigan.gov>; Richards, Margaret (AG) <RichardsM1@michigan.gov>; Donnelly, Mark (AG-Contractor) <donnellym@michigan.gov>
Cc: Michael Edmunds <medmunds@gaultdavison.com>; Nancy Temple <ntemple@kaZentemple.com>; Autumn Trantham <autumn@riziklaw.com>
Subject: Re: Baird v Nessel et al

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Josh,

At the beginning of this email string, you said you spoke for all the Defendants. But today, you speak only for Ms. Hamood and Ms. Worthy; therefore, I would like someone speaking on behalf of Nessel to inform me of the Attorney General's position on convening a Rule 26(f) conference.

Also, do you have any case law supporting your defiance of the federal rules?

Best regards for Christmas and New Year,

Michael B. Rizik Jr.
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From: "Smith, Joshua (AG)" <SmithJ191@michigan.gov>

Date: Thursday, December 12, 2024 at 11:43 AM
To: Michael Rizik <lawyers@riziklaw.com>, "Southerland, KrisRn (AG)" <SoutherlandK@michigan.gov>, "Thomas, Lynne (AG)" <ThomasL21@michigan.gov>, "Barranco, Kyla (AG)" <BarrancoK@michigan.gov>, "Albro, Lisa (AG)" <AlbroL@michigan.gov>, "Ballinger, Bobbi (AG)" <BallingerB1@michigan.gov>, "Barton, Brenda (AG)" <bartonb2@michigan.gov>, "Richards, Margaret (AG)" <RichardsM1@michigan.gov>, "Donnelly, Mark (AG-Contractor)" <donnellym@michigan.gov>
Cc: Michael Edmunds <medmunds@gaultdavison.com>, Nancy Temple <ntemple@kaZentemple.com>, Autumn Trantham <autumn@riziklaw.com>
Subject: RE: Baird v Nessel et al

Please find attached a proposed stipulation to extend the due date for Defendants' responsive pleadings. Let me know if I have your consent to sign for you.

I can only speak for Defendants Hammoud and Worthy. It's fair to say that neither a Rule 26 conference nor discovery is appropriate at this point. To the extent that Defendants file a motion to dismiss based on immunity, discovery would be inappropriate because a decision on the motion would shape the scope of discovery or result in dismissal of the case.

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From: Michael Rizik <lawyers@riziklaw.com>
Sent: Thursday, December 12, 2024 10:23 AM
To: Smith, Joshua (AG) <SmithJ191@michigan.gov>; Southerland, KrisRn (AG) <SoutherlandK@michigan.gov>; Thomas, Lynne (AG) <ThomasL21@michigan.gov>; Barranco, Kyla (AG) <BarrancoK@michigan.gov>; Albro, Lisa (AG) <AlbroL@michigan.gov>; Ballinger, Bobbi (AG) <BallingerB1@michigan.gov>; Barton, Brenda (AG) <bartonb2@michigan.gov>; Richards, Margaret (AG) <RichardsM1@michigan.gov>; Donnelly, Mark (AG-Contractor) <donnellym@michigan.gov>
Cc: Michael Edmunds <medmunds@gaultdavison.com>; Nancy Temple <ntemple@kaZentemple.com>; Autumn Trantham <autumn@riziklaw.com>
Subject: Re: Baird v Nessel et al

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Sounds good.

So, I can represent to the court you will not agree to the Rule 26(f) conference?

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From: "Smith, Joshua (AG)" <SmithJ191@michigan.gov>
Date: Thursday, December 12, 2024 at 8:50 AM
To: Michael Rizik <lawyers@riziklaw.com>, "Southerland, KrisRn (AG)" <SoutherlandK@michigan.gov>, "Thomas, Lynne (AG)" <ThomasL21@michigan.gov>, "Barranco, Kyla (AG)" <BarrancoK@michigan.gov>, "Albro, Lisa (AG)" <AlbroL@michigan.gov>, "Ballinger, Bobbi (AG)" <BallingerB1@michigan.gov>, "Barton, Brenda (AG)" <bartonb2@michigan.gov>, "Richards, Margaret (AG)" <RichardsM1@michigan.gov>, "Donnelly, Mark (AG-Contractor)" <donnellym@michigan.gov>
Cc: Michael Edmunds <medmunds@gaultdavison.com>, Nancy Temple <ntemple@kaZentemple.com>
Subject: RE: Baird v Nessel et al

Thanks, Michael. I anticipate sending your team a proposed stipulation to extend later today.

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From: Michael Rizik <lawyers@riziklaw.com>
Sent: Wednesday, December 11, 2024 6:16 PM
To: Smith, Joshua (AG) <SmithJ191@michigan.gov>; Southerland, KrisRn (AG) <SoutherlandK@michigan.gov>; Thomas, Lynne (AG) <ThomasL21@michigan.gov>; Barranco, Kyla (AG) <BarrancoK@michigan.gov>; Albro, Lisa (AG) <AlbroL@michigan.gov>; Ballinger, Bobbi (AG) <BallingerB1@michigan.gov>; Barton, Brenda (AG) <bartonb2@michigan.gov>; Richards, Margaret (AG) <RichardsM1@michigan.gov>; Donnelly, Mark (AG-Contractor) <donnellym@michigan.gov>
Cc: Michael Edmunds <medmunds@gaultdavison.com>; Nancy Temple <ntemple@kaZentemple.com>
Subject: Re: Baird v Nessel et al

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Joshua,

Thank you for your quick response. First, we agree to your extension of time to file a responsive document.

Second, we disagree that meeting and discussing conducting a Rule 26(f) conference is premature. The rule's plain language states: "[T]he parties must confer as soon as practicable - and in any event at least 21 days before a scheduling conference is to be held . . ." See AFT

Mich v. Project Veritas, 294 F. Supp. 3d 693, 694 (E.D. Mich. 2018).

Despite the impending motions to dismiss, it is well-established that such motions do not automatically stay discovery or the obligation to participate in a Rule 26(f) conference. As noted in AFT Michigan, supra, the Court rejected the argument that a pending motion to dismiss negates the need for a Rule 26(f) conference.

“...after that conference, discovery is expected to commence. See *Myers v. Marietta Mem'l Hosp.*, No. 2:15-CV-2956, 2016 U.S. Dist. LEXIS 74137, 2016 WL 3165974, at *2 (S.D. Ohio June 7, 2016), (Rule 26(d)(1) ‘permits parties to begin discovery after they have held their Rule 26(f) conference.’); *Jennings v. City of LaFollette*, No. 3:09-CV-72, 2010 U.S. Dist. LEXIS 87328, 2010 WL 4704462, at *1 (E.D. Tenn. Aug. 24, 2010) (‘Following the parties’ Rule 26(f) conference, discovery in this matter will commence. . . .’); *Loop AI Labs Inc v. Gatti*, No. 15-CV-00798-HSG(DMR), 2015 U.S. Dist. LEXIS 170349, 2015 WL 9269758, at *2 (N.D. Cal. Dec. 21, 2015) (Rule 26(d)(1) permits the parties to commence discovery after the Rule 26(f) conference). (Id, p 694)

Additionally,

“Defendants note that the practice guidelines indicate that Judge Parker will not ordinarily hold scheduling conferences until after *dispositive motions* have been decided, [ECF No. 53-2, PageID 1621], *but the guidelines do not state that a Rule 26(f) conference or discovery must await a decision on such a motion.*(Emphasis supplied).

While the breadth, scope, and timing of discovery may be the subject of discussion, there is no dispute that it should begin now.

Also, in Plastic Omnium Auto Inergy Indus SA de VC v. MCC Dev, Inc, ___F Supp 3d___; 2022 U.S. Dist. LEXIS 197977, at 1-2 (ED Mich, Jan. 5, 2022), the Court said:

“Defendant asserted that discovery is premature because the parties have not yet had a Federal Rule of Civil Procedure 26(f) conference, but defendant has refused to participate in that conference, citing its motion to dismiss. See ECF No. 25. *Defendant’s reliance on its motion to dismiss lacks merit; that motion did not automatically stay discovery or defendant’s obligation to ‘in good faith [] agree to a discovery plan’ ‘as soon as practicable.’ Rule 26(f); see also AFT Michigan v. Project Veritas, 294 F. Supp. 3d 693 (E.D. Mich. 2018) (rejecting defendants’ argument that they need not participate in Rule 26(f) conference pending their motion for dismissal). [*2]” (Emphasis supplied).*

Please reconsider your position.

Michael B. Rizik Jr.

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From: "Smith, Joshua (AG)" <SmithJ191@michigan.gov>
Date: Monday, December 9, 2024 at 5:19 PM
To: Michael Rizik <lawyers@riziklaw.com>, "Southerland, KrisRn (AG)" <SoutherlandK@michigan.gov>, "Thomas, Lynne (AG)" <ThomasL21@michigan.gov>, "Barranco, Kyla (AG)" <BarrancoK@michigan.gov>, "Albro, Lisa (AG)" <AlbroL@michigan.gov>, "Ballinger, Bobbi (AG)" <BallingerB1@michigan.gov>, "Barton, Brenda (AG)" <bartonb2@michigan.gov>, "Richards, Margaret (AG)" <RichardsM1@michigan.gov>, "Donnelly, Mark (AG-Contractor)" <donnellym@michigan.gov>
Cc: Michael Edmunds <medmunds@gaultdavison.com>, Nancy Temple <ntemple@kaZentemple.com>
Subject: RE: Baird v Nessel et al

Thank you for reaching out to us. On behalf of all Defendants, we believe that it is premature to hold a Rule 26 conference until motions to dismiss have been decided by the Court. It is likely that Defendants will move to dismiss the second amended complaint.

Our responsive pleadings are due Dec. 20. Would you agree to an extension to Jan. 10, which puts us past the holidays? If so, I can prepare a stipulated order.

Thanks!

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From: Michael Rizik <lawyers@riziklaw.com>

Sent: Monday, December 9, 2024 12:53 PM

To: Smith, Joshua (AG) <SmithJ191@michigan.gov>; Marsh, Monaca (AG) <MarshM3@michigan.gov>;

Southerland, KrisRn (AG) <SoutherlandK@michigan.gov>; Thomas, Lynne (AG)

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Cc: Michael Edmunds <medmunds@gaultdavison.com>; Nancy Temple <ntemple@kaZentemple.com>

Subject: Baird v Nessel et al

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Dear Counsel,

I write on behalf of our client, Richard L. Baird, in Baird v. Nessel et al., currently pending in the Eastern District of Michigan before Hon. Robert J. White.

As you know, Federal Rule of Civil Procedure 26(f) requires the parties to confer as soon as practicable to discuss the nature and basis of their claims and defenses, the possibilities for promptly settling or resolving the case, and develop a proposed discovery plan. Given this requirement, we suggest scheduling our Rule 26(f) conference this week.

In addition, we anticipate you will file motions to dismiss under Rule 12(b)(6) based on absolute and qualified prosecutorial immunity. Given such a motion's complexities and potential implications, we must address it during our Rule 26(f) conference. Specifically, we should talk about how this anticipated motion may impact the scope and timing of discovery and any other pretrial matters that may arise.

Please let Autumn Trantham ([autumn @riziklaw.com](mailto:autumn@riziklaw.com)), with an email copy to all of us, know your availability for the Rule 26(f) conference and if there are any specific issues you would like to include on the agenda. Hopefully, in this way, we can ensure a smooth and efficient pretrial

process.

Thank you for your attention to this matter. I look forward to hearing back from you soon.

Sincerely,

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